

No. 12611

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United States  
Court of Appeals  
for the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

CALIFORNIA ELECTRIC POWER COM-  
PANY, a Corporation,  
Appellee.

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Transcript of Record

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Appeal from the District Court of the United States  
Southern District of California  
Central Division.

**FILED**

OCT 30 1950

PAUL P. O'BRIEN,  
CLERK



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For the Ninth Circuit

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Transcript of Record

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Appeal from the United States District Court,  
Southern District of California,  
Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 14, Calif.



In The District Court of The United States For  
The Southern District of California  
Central Division

No. 7888-B

CALIFORNIA ELECTRIC POWER COMPANY,  
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT TO RECOVER DOCUMENTARY  
STAMP TAXES ILLEGALLY ASSESSED  
AND COLLECTED

Comes now the Plaintiff, and for cause of action  
against the Defendant alleges:

I.

That Plaintiff is a corporation duly organized  
and existing under and by virtue of the laws of the  
State of Delaware, duly licensed to engage in busi-  
ness in the State of California; that Plaintiff's  
principal office is located at 3771 Eighth Street,  
City of Riverside, County of Riverside, State of  
California, and in the Southern District of Califor-  
nia, Central Division.

II.

That the documentary stamp taxes in the amount  
of \$4,549.51, sought to be recovered herein, were  
paid on or about January 28, 1942, by the Plaintiff



to Ralph Nicholas, the duly appointed, qualified and acting Collector of Internal Revenue for the collection district comprising the State of Colorado.

### III.

That jurisdiction of this Court exists under Title 28, U. S. Code, Section 41 (5) and (20), and Section 762, and under Section 3772(a)(2) of the Internal Revenue Code.

### IV.

That by the amendment to its Certificate of Incorporation effective June 30, 1941, the name of the Plaintiff Corporation was changed from The Nevada-California Electric Corporation to California Electric Power Company.

### V.

That prior to June 30, 1941, the capital structure of the Plaintiff was as follows:

#### Outstanding Shares Immediately Prior

#### To June 30, 1941 Recapitalization

Old Preferred—105,023 sh. @ \$100 = \$10,502,300.00

Common — 84,683 sh. @ \$ 10 = 846,830.00

Total Capital Before Recapitalization \$11,349,130.00

### VI.

That by an amendment of the Certificate of Incorporation of the California Electric Power Company effective June 30, 1941, it was provided that each of the outstanding shares of old Preferred Stock should be automatically converted into four-fifths of a share of \$3.00 Cumulative Preferred Stock of the par value of \$50.00 each, and 6 shares of Common Stock. This was the sole and only change

made in the capital structure by said amendment to the Certificate of Incorporation. There was no change in Plaintiff's total capital stock account since the reduction in the Preferred Capital Stock account in the amount of \$60.00 per share was offset by a corresponding increase in the Common Capital Stock account. This conversion of stock created the following capital structure:

\$3.00 Cumulative Preferred Stock, 84,018.4 sh.	\$ 4,200,920.00
Common Stock, 714,821 sh.	7,148,210.00
Total.....	<u><u>\$11,349,130.00</u></u>

#### VII.

That on June 30, 1941, unpaid Cumulative Preferred dividends on the old Preferred Stock of Plaintiff Corporation amounted to \$11.00 per share.

#### VIII.

That in order to eliminate and settle the aforesaid arrearages in dividends, the stockholders and the Board of Directors of Plaintiff Corporation authorized the making of an offer to the preferred Stockholders that Plaintiff Corporation would issue one-fifth of a share of \$3.00 Cumulative Preferred Stock and \$1.00 in cash in settlement of all arrearages in dividends on each share of the old Preferred Stock, such offer to remain open until June 25, 1941.

#### IX.

That pursuant to said offer Plaintiff Corporation issued new \$3.00 Cumulative Preferred Stock at the rate of one share for each 5 shares of the old Preferred Stock to stockholders accepting the afore-

said offer, such new shares being issued if, as, and when the dividend arrearages were waived, and in exchange therefor. Upon completion of this exchange, new capital sufficient to pay the dividend arrearages was transferred from surplus to the Preferred Stock account, so that the interest of the preferred stockholders accepting the offer was transmuted from a claim for dividends into additional shares of stock representing capitalized surplus.

## X.

That after the exchange of old Preferred Stock for the new \$3.00 Cumulative Preferred Stock and the issuance of new shares of new \$3.00 Cumulative Preferred Stock in settlement of dividend arrearages, the capital structure of Plaintiff Corporation was as follows:

1. Stock outstanding in hands of those accepting offer as to accumulated unpaid dividends on old Preferred:

New Preferred—104,722 sh. @ \$50.00 =	\$5,236,100.00
Common —628,332 sh. @ \$10.00 =	6,283,320.00

2. Stock outstanding in hands of those not accepting offer and holding 301 shares of the old Preferred:

New Preferred—240.8 sh. @ \$50.00 =	\$12,040.00
Common —1806 sh. @ \$10.00 =	18,060.00
Also New Preferred—.2 sh. @ \$50.00 (Fractional sh.) =	10.00

3. Common Stock Previously Outstanding—84,683 shares.

## Totals:

New Preferred Stock—104,963 sh. @ \$50.00	\$ 5,248,150.00
Common Stock —714,821 sh. @ \$10.00	7,148,210.00

Total Capital After Exchanges of Stock	\$12,396,360.00
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Total Capital Before Exchanges of Stock	11,349,130.00
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New Capital Added	\$1,047,230.00
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## XI.

That the number of shares of new Preferred Stock at \$50.00 per share issued up to January 24, 1942, was 103,398, of which four-fifths, or \$40.00 per share, was tax free, inasmuch as it represented a mere exchange for old Preferred Stock. There was involved, therefore,  $\$40.00 \times 103,398$  shares of old capital, or \$4,135,920.00, on which tax at \$.11 per \$100.00, or a total of \$4,549.51, was overpaid on, to-wit, January 28, 1942.

## XII.

That the Commissioner of Internal Revenue, by a letter dated December 16, 1941, addressed to the Collector of Internal Revenue at Denver, Colorado, a copy of which is attached hereto and made a part hereof, marked "Exhibit A," held that the entire issue of new \$3.00 Cumulative Preferred shares was subject to the original issue tax imposed by Section 1802(a) of the Internal Revenue Code, but that no tax attaches to the issuance of the additional Common shares as provided in the amendment of the Certificate of Incorporation.

## XIII.

That on or about January 24, 1946, and within four years of the date of payment of the aforesaid stamp tax in the amount of \$4,549.51, Plaintiff filed with the Collector of Internal Revenue at Denver, Colorado, a Claim for Refund of said stamp tax illegally and erroneously collected by said Ralph Nicholas as aforesaid, including interest thereon, as provided by law, a copy of which Claim is attached hereto and made a part hereof, marked "Ex-



hibit B.” Said Claim set forth, under oath, the grounds for refund and facts sufficient to apprise the said Collector, the Commissioner of Internal Revenue, and the Defendant, of the exact basis of the Claim.

#### XIV.

That the Commissioner of Internal Revenue, by letter dated June 16, 1947, erroneously and illegally rejected said Claim for Refund filed on or about January 24, 1946, as aforesaid, a copy of said letter of rejection being attached hereto and made a part hereof, marked “Exhibit C.”

#### XV.

That the said ruling of the Commissioner of Internal Revenue and the rejection of said Claim for Refund by said Commissioner were erroneous and invalid as to the four-fifths shares of \$3.00 Cumulative Preferred Stock issued in exchange for old Preferred Stock, and that the taxes paid on the issuance of any stock other than the one-fifth share of \$3.00 Cumulative Preferred Stock was illegally paid and collected and should be refunded, together with statutory interest thereon.

Wherefore, Plaintiff prays judgment upon the facts and law in the amount of \$4,549.51, together with interest thereon, as provided by law.

/s/ THOMAS R. DEMPSEY,  
/s/ WELLMAN P. THAYER,  
/s/ ARTHUR H. DEIBERT,  
/s/ WILLIAM L. KUMLER,

Attorneys for Plaintiff.

/s/ HENRY W. COIL,  
Associate Counsel.

State of California,  
County of Riverside—ss.

Howard Boylan, being first duly sworn on authority, deposes and says: That he is the official to-wit: Vice-President of California Electric Power Company, a corporation, Plaintiff above named, and as such verifies this Complaint on behalf of such corporation; that he has read the above and foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ HOWARD BOYLAN.

Subscribed and sworn to before me this 31st day of December, 1947.

[Seal] /s/ L. G. PECK,

Notary Public in and for the County of Riverside,  
State of California.

My Commission Expires July 3, 1950.

Exhibit A

Dec. 16, 1941

MT:M:REG

Collector of Internal Revenue,  
Denver, Colorado.

Attention: MT:CWR:FLC:

Reference is made to your letter of November 24, 1941, inclosing copies of documents relating to the

recapitalization of the Nevada-California Electric Corporation.

The corporation by amendment to its certificate of incorporation changed its name to California Electric Power Company.

Prior to the amendment of the company's certificate of incorporation there was authorized to be issued 250,000 shares of \$100.00 par value preferred stock and 250,000 shares of \$10.00 par value common stock. Pursuant to the terms of the amended certificate of incorporation the company was authorized to issue 200,000 shares of \$50.00 par value cumulative prior preferred stock, 115,000 shares of \$50.00 par value \$3.00 cumulative preferred stock and 1,200,000 shares of \$10.00 par value common stock. Upon the amendment becoming effective, each existing share of the old \$100.00 par value preferred stock was automatically converted and reclassified into four-fifths of a share of \$50.00 par value \$3.00 preferred stock and 6 shares of \$10.00 par value common stock.

On June 30, 1941, the unpaid cumulative preferred dividends on the old preferred stock amounted to \$11.00 per share.

The company offered to each holder of the existing preferred stock in full settlement of the \$11.00 per share preferred dividend arrears, \$10.00 par value, or one-fifth of a share, of the new \$3.00 preferred stock and \$1.00 in cash. The stockholders accepting this offer were required to surrender their old preferred shares in exchange for one full share of the new \$3.00 preferred stock, 6 shares of the



common stock and \$1.00 in cash. The preferred stockholders who did not elect to accept the offer were required to surrender their old preferred shares in exchange for four-fifths share of the new \$3.00 preferred stock and 6 shares of common stock for each share of the old preferred stock held.

The conversion of one share of the old \$100.00 par value preferred stock into four-fifths of a share of the new \$50.00 par value preferred stock and 6 shares of \$10.00 par value common stock, does not affect the company's total capital stock account, since the reduction in the preferred capital stock account in the amount of \$60.00 per share is offset by a corresponding increase in the common capital stock account. However, it appears that the \$3.00 cumulative preferred stock account is increased by the transfer from surplus account of an amount at least sufficient to take care of the \$3.00 cumulative preferred stock issued to pay the accrued dividends on the old \$100.00 par value preferred stock; that is, the aggregate of the one-fifth shares issued to the preferred stockholders who accept the company's offer to pay the accrued dividends in this manner.

The situation is, therefore, that at the effective date of the amendment to the certificate of incorporation an undisclosed number of \$100.00 par value preferred shares were issued against a preferred capital stock account in a certain amount, that 60 per cent of the amount of this account was absorbed in the common capital stock account against which common shares were issued, that an undisclosed amount of surplus was transferred to the \$3.00

cumulative preferred stock account and against this adjusted account all of the new \$3.00 cumulative preferred shares were issued, that is, not only the one-fifth share issued to pay the accrued preferred stock dividends but also the shares issued in exchange for the old preferred stock pursuant to the conversion as provided in the amendment to the certificate of incorporation. All of the new preferred shares were issued against the preferred stock account without any allocation. The inclusion of the old preferred capital stock account, or a part thereof, and the earned surplus in the new \$3.00 preferred capital stock account inured to the benefit of all of the preferred stockholders. Each received an interest in the new capital measured by the number of shares held. Thus each certificate constituted a new certificate of interest in the newly adjusted preferred capital of the company and, consequently, was of a kind never before issued. All of the shares represented precisely the same interest, all were issued under the same conditions and all were based on the same newly adjusted capital.

It is therefore ruled that all of the new \$3.00 cumulative preferred shares are subject to the original issue tax as imposed by section 1802(a) of the Internal Revenue Code.

The issuance, from time to time, of all or any part of the 200,000 shares of \$50.00 par value cumulative prior preferred stock will likewise be subject to the original issue tax.

No tax attaches to the issuance of the additional

common shares as provided in the amendment to the certificate of incorporation.

D. S. BLISS,  
Deputy Commissioner.

Exhibit B

Claim

To Be Filed With The Collector Where Assessment  
Was Made Or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[xxx] Refund or Tax Illegally Collected.

[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[ ] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collector's Stamp: (Date received) [blank].

State of California,  
County of Riverside—ss.

Name of taxpayer or purchaser of stamps—California Electric Power Company.

Business address—Riverside, California.  
Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, Colorado.

2. Period (if for income tax, make separate form for each taxable year) from....., 19..., to .....  
....., 19.....

3. Character of assessment or tax, Documentary Stamp Tax.

4. Amount of assessment, \$4,552.31; dates of payment, January 28, 1942.

5. Date stamps were purchased from the Government .....

6. Amount to be refunded, \$4,549.51.

7. Amount to be abated (not applicable to income, gift, or estate taxes) .....

8. The time within which this claim may be legally filed, expires, under section 3313 I.R.C. on, to-wit, January 27, 1946.

The deponent verily believes that this claim should be allowed for the following reasons:

### Statement

#### I.

Taxpayer is and was, at all times herein referred to, a Delaware corporation, with offices at Denver, Colorado and Riverside, California.

#### II.

Prior to June 30, 1941, the capital structure of the California Electric Power Company was as follows:



## Outstanding Shares as of 1-1-41 :

Old Preferred—114,612 sh. at \$100 =	\$11,461,200
Common — 85,883 sh. at \$ 10 =	858,830

Total Capital .....	\$12,320,030
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## Shares Reacquired Prior to 6-30-41 :

Old Preferred—9,589 sh. at \$100 =	\$ 958,900
Common — 1,200 sh. at \$ 10 =	12,000

Total Reacquired .....	\$ 970,900
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## Outstanding Shares Immediately Prior to 6-30-41 Recapitalization:

Old Preferred—105,023 sh. at \$100 =	\$10,502,300
Common — 84,683 sh. at \$ 10 =	846,830

Total Capital Before Recapitalization.....	\$11,349,130
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## III.

By an Amendment of the Certificate of Incorporation of the California Electric Power Company effective June 30, 1941, it was provided that each of the outstanding shares of old Preferred Stock should be automatically converted into 4/5's share of \$3 Cumulative Preferred Stock of the par value of \$50 each, and 6 shares of Common Stock. This was the sole and only change made in the preferred capital or the total capital by the said Amendment to the Certificate of Incorporation. It created no increase in preferred capital or total capital, and standing alone, created the following capital structure:

\$3 Cumulative Preferred Stock.....	\$4,200,920
Common Stock .....	7,148,210
Total.....	\$11,349,130

However, at the same meetings of the Board of Directors and of the stockholders of the company at which the aforesaid Amendment was authorized, there was further authorized to be made an offer

to the old preferred stockholders, that provided the proposed Amendment became effective on or before June 30, 1941, the Corporation would issue 1/5 share of \$3 Cumulative Preferred Stock and \$1 in cash in settlement of all arrearage dividends on each share of old Preferred Stock, such offer to remain open until June 25, 1941.

The outstanding shares, after the above described recapitalization, were as follows:

1. Stock outstanding in hands of those accepting entire plan as to accumulated unpaid dividends on old Preferred:		
New Preferred—104,722 sh. @ \$50 =		\$ 5,236,100
Common —628,332 sh. @ \$10 =		6,283,320
2. Stock outstanding in hands of those not accepting plan and holding 301 shares of the old Preferred:		
New Preferred—240.8 sh. @ \$50 =		\$ 12,040
Common —1806 sh. @ \$10 =		18,060
Also New Preferred—.2 sh. @ \$50		
(a/c Fract. sh.) =		10
3. Common Stock Previously Outstanding.....		846,830
Totals:		
New Preferred—104,963 sh. @ \$50 =		\$ 5,248,150
Common —714,821 sh. @ \$10 =		7,148,210
Total Capital After Recapitalization .....		\$12,396,360
Total Capital Before Recapitalization .....		11,349,130
New Capital Added .....		\$ 1,047,230

#### IV.

Section 1802 (a) of the Internal Revenue Code as it existed on June 30, 1941, provided the following stamp tax: "On each original issue, whether on organization or reorganization, of shares or certificates of stock \* \* \* on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation \* \* \* 11 cents \* \* \*"

## V.

The number of shares of new Preferred Stock at \$50 per share issued to January 24, 1942, was 103,398, on which  $\frac{4}{5}$  or \$40 per share, was tax-free, inasmuch as it represented a mere exchange for old Preferred Stock. There was involved, therefore, \$40 x 103,398 of old capital, or \$4,135,920, on which tax at \$.11 per \$100, or \$4,549.10, was overpaid on, to-wit, January 28, 1942.

## VI.

The Deputy Commissioner of Internal Revenue, by a letter dated December 16, 1941, addressed to the Collector of Internal Revenue at Denver, Colorado, copy of which is attached hereto and made a part hereof marked Exhibit "A," held that all of the new \$3 Cumulative Preferred Shares were subject to the Original Issue tax imposed by Section 1802 (a) of the Internal Revenue Code, but that no tax attaches to the issuance of the additional Common Shares as provided in the Amendment of the Certificate of Incorporation.

The corporation contends that such ruling is erroneous and invalid as to the  $\frac{4}{5}$ 's shares of \$3 Cumulative Preferred Stock, and that the taxes paid on the issuance of any stock other than the  $\frac{1}{5}$  shares of \$3 Cumulative Preferred Stock was illegally paid and collected, and should be refunded together with statutory interest thereon.

## VII.

It has generally been held that no tax is due on



an exchange of shares for shares on reorganization where there is no increase of capital.

Bowers v. West Va. P. & P Co., 297 Fed. 225.

American L.M. Co., v. Dean, 292 Fed. 620.

Trumbull Steel Co. v. Routzahn 292 Fed. 1009.

Standard Mfg. Co. v. Heiner, 300 Fed. 252.

This is so even where the class or kind of new stock differs from the class or kind of old stock or when two classes of stock are issued in lieu of one class of old stock.

Re Grand-Lees Gear Co., 1 Fed (2d) 293.

Cleveland Prov. Co. v. Weiss, 4 Fed. (2d) 408.

Cuba Ry. Co. v. U. S., 60 Ct. Claims 272.

Goodyear T. & R. Co. v. U. S., 60 Ct. Claims 448.

Bailey Co. v. Routzahn, 15 A.F.T.R. 497.

## VIII.

Section 113.25 of Regulations 71, in effect June 30, 1941, listed among stock issues not subject to the tax the following: “(f) The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise.”

## IX.

On May 13, 1943, the Seventh Circuit Court of Appeals decided the case of United States v. Pure Oil Company, 135 Fed. (2d) 578, in which the facts

closely parallel those of the present case. In the course of its opinion the Court stated the pertinent facts and reached conclusions of law as follows:

“On April 1, 1936, defendant had outstanding certain shares of preferred stock on which there were unpaid accumulated dividends, on 8 per cent stock, of \$25.50 per share, on 6 per cent stock, \$19.125 per share. Defendant proposed, and its shareholders agreed, their certificates be exchanged, share for share, for equal shares of new preferred stock, paying a lower dividend, plus additional shares of new stock in satisfaction of the unpaid dividends. As a result, 264,226 shares of outstanding preferred stock were surrendered and an equivalent number of shares of new preferred delivered to the holders, who received also 56,115 shares of new stock in satisfaction of unpaid dividends.”

“\* \* \* Defendant recognized that the shares issued in satisfaction of unpaid dividends were within the term ‘original issue’ and paid the tax upon them. The Government contended, and the trial court found, that the certificates for 264,226 shares issued in exchange for outstanding stock constituted likewise an original issue. The propriety of that conclusion is now questioned.”

“The statute clearly indicates that, to be taxable, certificates must be, in point of time, the first issued, whereby the issuing corporation certifies ownership by its shareholders of their aliquot parts of the capital represented by the certificates. By specifying ‘original issue’ we think it clear that the Congress did not intend to tax each issue but only that which

precedes all other issues subsequently made when original certificates are surrendered and new ones delivered in their place to the same shareholders for no new monetary consideration. *Edwards v. Wabash Railway Co.*, 2 Cir., 264 F. 610. Nor do we think it of any importance whether shares are converted into identical or variant stock or whether preferred is exchanged for common or common for preferred, with resulting differences in rights and privileges, for the test is not whether the reissue is of different type but, rather, whether it is 'original'."

"It was to defendant's interest to liquidate its unpaid accumulated dividends and to bring about a lower dividend for the future. When, with this end in view, defendant issued an equal amount of new stock for that part of the corporate assets represented by previously existing shares, it made no addition to its capital. It accomplished nothing other than replacement of older preferred stock with new, smaller dividend stock; the holders retained the same proportionate interests in the capital assets. The additional shares issued in satisfaction of unpaid dividends represented the only contribution to capital effectuated; that and that alone was an original issue, *Edwards v. Wabash Railway Co.*, 2 Cir. 264 F. 610; *Trumbull Steel Co. v. Routzahn*, D. C., 292 F. 1009; *Routzahn v. Trumbull Steel Co.*, 6 Cir., 300 F. 1006; *West Virginia Pulp & Paper Co. v. Bowers*, D. C., 293 F. 144, affirmed 2 Cir., 297 F. 225, certiorari denied 265 U. S. 584, 44 S.Ct. 459, 68 L.Ed. 1191; *Standard Manufacturing Co. v. Heiner*, D. C., 300 F. 252; *Cuba Railway Co. v.*



United States, 60 Ct.Cl. 272; Cleveland Provision Co. v. Weiss, D. C., 4 F, 2d 408; In re Grant-Lees Gear Co., Bankrupt, D. C., 1 F. 2d 393."

"The Government insists that the entries upon the corporate books fail to disclose any shares specifically designated as a substitution for old certificates. It suggests that inasmuch as no shares were issued in lieu of any certain specified shares and no specific certificates charged against capital or surplus, it is impossible to classify the entire new issue as other than original. But book entries alone are not decisive. Rio Grande Oil Company v. Welch, 9 Cir., 101 F.2d 454. And, so here, we receive no enlightenment from the formal ledger capital set-up. The undisputed fact is that the old preferred stock was exchanged share for share and the dividend arrears satisfied by issuance of additional shares. Whatever the book entries, the only new thing that could properly have gone into the capital account was the contribution by the shareholders of their unpaid dividends to the corporation in consideration of which they received the additional shares."

"The Government insists that the pronouncement of Rio Grande Oil Company v. Welch, *supra*, leads necessarily to the conclusion that the entire issue was original. But the basis for decision in that case is absent here in that there the court found that a transaction effectuated a complete reorganization and a fundamental change in the entire capital structure. Here the corporate structure remained the same except as to the additional shares issued in

satisfaction of unpaid dividends.”

The essential fact as stated by the Court in the above case is identical with that in the present case, viz., that the corporate structure remained the same except as to the additional shares issued in satisfaction of unpaid dividends, and only the latter may be subjected to the tax.

The Government made no application for certiorari in the foregoing case.

## X.

Wherefore, taxpayer requests and demands refund of the aforesaid amount of money in the sum of \$4,549.51 as paid by it to the Collector of Internal Revenue for documentary stamps, together with interest thereon as provided by law.

## XI.

Claimant requests and demands such further or additional refund or refunds as may now or hereafter appear to be due it by reason of the foregoing or on account of (a) any mistake in fact or in law made by it or any officer, clerk or other employee of the United States Treasury Department, amendment and/or adjustment of the said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee of the United States Treasury Department, (d) any repealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law,

whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with the said return, whether covered by the foregoing or not so covered.

CALIFORNIA ELECTRIC  
POWER COMPANY,

By /s/ H. BOYLAN,  
Vice-President.

Sworn to and subscribed before me this 14th day  
of January, 1946.

/s/ L. G. PECK,

Notary Public in and for the County of Riverside,  
State of California.

My commission expires July 3, 1946.

Exhibit C

Treasury Department  
Washington 25

Office of  
Commissioner of  
Internal Revenue  
Refer to  
MT:M:HB  
Cl. C-43849

June 16, 1947

California Electric Power Company,  
Riverside, California.

Gentlemen:

Your claim for redemption of used documentary  
stamps in the amount of \$4,549.51 has been ex-

amined. The tax was paid on the issuance of shares of capital stock by your corporation in connection with your recapitalization.

From the evidence on file in the case it appears that your corporation on June 30, 1941, by amendment to its certificate of incorporation changed its name from Nevada-California Electric Corporation to California Electric Power Company, and provided for certain changes in its capital structure. Prior to its recapitalization your corporation had outstanding 105,023 shares of \$100.00 par value preferred stock representing a capital of \$10,502,300.00 and 84,683 shares of \$10.00 par value common stock representing a capital of \$846,830.00 or a total capital of \$11,349,130.00. Upon the amendment to the certificate of incorporation becoming effective, each outstanding share of the old \$100.00 par value preferred stock was automatically converted into four-fifths of a share of \$50.00 par value \$3.00 preferred stock and 6 shares of \$10.00 par value common stock.

On June 30, 1941, the unpaid cumulative dividends on the old preferred stock amounted to \$11.00 per share. The corporation offered to each holder of the existing preferred stock in full settlement of the \$11.00 per share preferred dividend arrears, one-fifths of a share of the new \$3.00 preferred stock and \$1.00 in cash. The stockholders accepting this offer were required to surrender their old preferred shares in exchange for one full share of the new \$3.00 preferred stock, 6 shares of the common stock and \$1.00 in cash. The preferred stockholders who



did not elect to accept the offer were required to surrender their old preferred shares in exchange for four-fifths share of the new \$3.00 preferred stock and 6 shares of common stock for each share of the old preferred stock held. The holders of 301 shares of old preferred stock did not accept the above-described offer. The \$3.00 cumulative preferred stock account was increased by the transfer from surplus account of \$1,047,230.00 to take care of the \$3.00 cumulative preferred stock issued to pay the accrued dividends on the old \$100.00 par value preferred stock; that is, the aggregate of the one-fifth share issued to the preferred stockholders who accepted the company's offer to pay the accrued dividends in this manner.

Shares or certificates of stock are said to be of "original issue" when they are issued against capital which for the first time is included in the capital stock account. In the above transaction, the amount of \$1,047,230.00 which was transferred from surplus represented capital never previously included in the capital preferred stock account. The old capital and the new capital were intermingled in such a way that it is impossible to determine which specific shares are represented by the new capital added to the preferred stock account. Each preferred stockholder received an interest in the new capital measured by the number of shares held. Each preferred share issued thus constituted a new certificate of interest in the newly adjusted preferred capital of the corporation and, consequently, was a kind never before issued.

In view of the foregoing, it is held that documentary stamps in the correct amount were properly affixed and canceled on the issuance of the new \$3.00 cumulative preferred shares. Accordingly, your claim is rejected.

Very truly yours,

JOSEPH D. NUNAN JR.,

Commissioner.

By /s/ D. S. BLISS,

Deputy Commissioner.

[Endorsed]: Filed January 6, 1948.

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[Title of District Court and Cause.]

No. 7888-B Civil

ANSWER OF UNITED STATES  
OF AMERICA

Comes now the defendant in the above-entitled action and for answer to plaintiff's complaint admits, denies and alleges, as follows:

I.

Paragraph numbered I is admitted.

II.

Paragraph numbered II is admitted.

III.

Paragraph numbered III contains no allegation of fact and, therefore, does not require answering.

## IV.

Paragraph numbered IV is admitted.

## V.

Paragraph numbered V is admitted.

## VI.

The first and second sentences of paragraph numbered VI are admitted. The balance of the paragraph is denied.

## VII.

Paragraph numbered VII is admitted.

## VIII.

Paragraph numbered VIII is admitted.

## IX.

Paragraph numbered IX is admitted.

## X.

Paragraph numbered X is admitted.

## XI.

Paragraph numbered XI is denied.

## XII.

Paragraph numbered XII is admitted.

## XIII.

Answering paragraph numbered XIII, it is admitted that plaintiff filed on January 14, 1946, a

claim for the refund of \$4,549.51, and that the Exhibit B, attached to the complaint, is a copy of such claim, but any statement contained in said claim, which is not specifically admitted in this answer, is hereby denied. Except as herein admitted the whole of said paragraph is denied.

#### XIV.

Answering paragraph numbered XIV, it is admitted that the Commissioner of Internal Revenue rejected said claim and that the Exhibit C, attached to the complaint, is a copy of the Commissioner's letter advising of such rejection; but it is denied that any part of the claim was erroneously or illegally rejected.

#### XV.

Paragraph numbered XV is denied.

Wherefore, the defendant having fully answered prays that the plaintiff take nothing by its action and that the defendant recover its costs.

JAMES M. CARTER,  
United States Attorney,

E. H. MITCHELL and  
GEORGE M. BRYANT,  
Assistant United States  
Attorneys,

EUGENE HARPOLE,  
Special Attorney, Bureau  
of Internal Revenue.

By /s/ GEORGE M. BRYANT,  
Attorneys for Defendant.

[Endorsed]: Filed December 27, 1948.

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[Title of District Court and Cause.]

### STIPULATION OF FACTS

It Is Hereby Stipulated by and between California Electric Power Company, a corporation, Plaintiff, and the United States of America, Defendant, by their respective counsel, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to object at the trial to any part thereof on the grounds of immateriality or to introduce other and further evidence not at variance with the facts herein stipulated:

(1) That California Electric Power Company is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, duly licensed to engage in business in the State of California; that California Electric Power Company's principal office is located at 3771 Eighth Street, City of Riverside, County of Riverside, State of California, and in the Southern District of California Central Division.

(2) That the documentary stamp taxes here involved, in the amount of \$4,549.51, were paid on or about January 28, 1942, by the California Electric Power Company to Ralph Nicholas, the duly ap-



pointed, qualified and acting Collector of Internal Revenue for the collection district comprising the State of Colorado.

(3) That by amendment to its Certificate of Incorporation effective June 30, 1941, the name of the California Electric Power Company was changed from The Nevada-California Electric Corporation to California Electric Power Company.

(4) That prior to June 30, 1941, the capital structure of the California Electric Power Company was as follows:

Outstanding Shares Immediately Prior to June 30, 1941, Recapitalization		
Old Preferred—105,023 sh. @ \$100 =		\$10,502,300.00
Common — 84,683 sh. @ \$10 =		846,830.00
Total Capital Before Recapitalization....		<u><u>\$11,349,130.00</u></u>

(5) That by an amendment of the Certificate of Incorporation of the California Electric Power Company effective June 30, 1941, a copy of which is attached hereto marked "Exhibit A" and made a part hereof, it was provided that each of the outstanding shares of old Preferred Stock should be automatically converted into four-fifths of a share of \$3.00 Cumulative Preferred Stock of the par value of \$50.00 each, and 6 shares of Common Stock of the par value of \$10.00 each. This was the sole and only change made in the capital structure by said amendment to the Certificate of Incorporation.

(6) That on June 30, 1941, unpaid Cumulative Preferred dividends on the old Preferred Stock of

California Electric Power Company amounted to \$11.00 per share.

(7) That in order to eliminate and settle the aforesaid arrearages in dividends, the stockholders and the Board of Directors of California Electric Power Company authorized the making of an offer to the preferred stockholders that California Electric Power Company would issue one-fifth of a share of \$3.00 Cumulative Preferred Stock and \$1.00 in cash in settlement of all arrearages in dividends on each share of the old Preferred Stock, such offer to remain open until June 25, 1941. A copy of the resolution authorizing such offer is attached hereto, marked "Exhibit B" and made a part hereof.

(8) That pursuant to said offer, California Electric Power Company issued new \$3.00 Cumulative Preferred Stock at the rate of one share for each 5 shares of the old Preferred Stock to stockholders accepting the aforesaid offer, such new shares being issued if, as, and when the dividend arrearages were waived, and in exchange therefor. Upon completion of this exchange, new capital sufficient to pay the dividend arrearages was transferred from surplus to the Preferred Stock account, so that the interest of the preferred stockholders accepting the offer was transmuted from a claim for dividend into additional shares of stock representing capitalized surplus.

(9) That after the exchange of old Preferred Stock for the new \$3.00 Cumulative Preferred Stock



and the issuance of new shares of new \$3.00 Cumulative Preferred Stock in settlement of dividend arrearages, the capital structure of California Electric Power Company was as follows:

- (a) Stock outstanding in hands of those accepting offer as to accumulated unpaid dividends on old Preferred:

New Preferred—104,722 sh. @ \$50.00 .....	\$ 5,236,100.00
Common —628,332 sh. @ \$10.00 .....	6,283,320.00

- (b) Stock outstanding in hands of those not accepting offer and holding 301 shares of the old Preferred:

New Preferred—240.8 sh. @ \$50.00 .....	\$ 12,040.00
Common —1806 sh. @ \$10.00 .....	18,060.00
Also New Preferred .2 sh. @ \$50.00 (Fractional sh.) .....	10.00

- (c) Common Stock Previously Outstanding—84,683 shares.

Totals:

New Preferred Stock—104,963 sh. @ \$50.00 ....	\$ 5,248,150.00
Common Stock —714,821 sh. @ \$10.00....	7,148,210.00
Total Capital After Exchange of Stock.....	12,396,360.00
Total Capital Before Exchanges of Stock.....	11,349,130.00
New Capital Added .....	<u><u>\$ 1,047,230.00</u></u>

(10) That the number of shares of new Preferred Stock at \$50.00 per share issued up to January 24, 1942 was 103,398.

(11) That the Commissioner of Internal Revenue, by a letter dated December 16, 1941, addressed to the Collector of Internal Revenue at Denver, Colorado, a copy of which is attached hereto and made a part hereof, marked "Exhibit C," held that the entire issue of new \$3.00 Cumulative Pre-

ferred shares was subject to the original issue tax imposed by Section 1802 (a) of the Internal Revenue Code, but that no tax attaches to the issuance of the additional Common shares as provided in the amendment of the Certificate of Incorporation, hereinabove referred to.

(12) That California Electric Power Company has paid, and concedes that it was liable for such payment, documentary stamp taxes at the rate of \$.11 per \$100.00 on the amount of new capital added to its capital account in cancellation of dividend arrearages and against which new Preferred Stock was issued. That the additional sum of \$4,549.51, here in dispute, was paid on the value of the balance of new Preferred Stock issued up to January 24, 1942 in response to the Ruling described in the preceding paragraph.

(13) That on or about January 24, 1946 California Electric Power Company filed with the Collector of Internal Revenue at Denver, Colorado, a Claim for Refund of stamp taxes paid in the amount of \$4,549.51, together with interest thereon as provided by law, a copy of which claim is attached hereto, marked "Exhibit D."

(14) That the Commissioner of Internal Revenue, by letter dated June 16, 1947, rejected said Claim for Refund filed on or about January 24, 1946, as aforesaid, a copy of said letter of rejection be-

ing attached hereto and made a part hereof,  
marked "Exhibit E."

DEMPSEY, THAYER,  
DIEBERT & KUMLER,

By /s/ ARTHUR H. DEIBERT,  
Attorneys for Plaintiff.

JAMES M. CARTER,  
United States Attorney,

E. H. MITCHELL,  
Assistant United States  
Attorney,

EUGENE HARPOLE,  
Special Attorney, Bureau  
of Internal Revenue,

By /s/ EUGENE HARPOLE,  
Attorneys for Defendant.

## Exhibit A

Certified Copy of Amendment to the Certificate of Incorporation of The Nevada-California Electric Corporation (Named Changed June 30, 1941, to California Electric Power Company) Adopted by Stockholders of Said Company at a Special Meeting Held June 20, 1941.

## I.

To strike out Article First of the Certificate of Incorporation and to insert in lieu thereof the following:

First: The name of this Corporation is and shall be California Electric Power Company. Said corporation is sometimes hereinafter in this Certificate of Incorporation called "the Company" or "this Corporation."

## II.

To strike out the paragraphs numbered, respectively, (1) and (2) of Article Third of the Certificate of Incorporation as amended, and to insert in lieu thereof the following:

(1) To build, construct, erect, equip, repair, rebuild, improve, buy, sell, let, license, lease, use and operate plants, lines and works for the generation, transmission, distribution and other use of electric energy; also telegraph and telephone lines, plants and works, water works and plants, gas works and plants, oil and gas wells and oil and gas producing plants, dams, reservoirs, flumes, pipe lines, ditches, canals, aqueducts, water courses, hydraulic works,



and all other classes and kinds of plants, works, buildings, structures and improvements, together with all appurtenances incident thereto, or to the business of this Corporation, and to furnish the necessary labor and materials used or to be used in connection with any part of its business, and to sell or otherwise dispose of the products of or the services or facilities rendered by all such plants, lines, works and other property, and to do business as a public utility under the laws of the several states and the United States, or any of them, and to have and exercise the right of eminent domain as now or hereafter provided by law.

(2) To build, construct, erect, equip, repair, rebuild, improve, buy, sell, let, license, lease, use and operate real property, patent rights, mineral rights, rights to chemical processes, plants, lines, and works for the manufacture or use of ice, carbon dioxide and other refrigerants, whether now or hereafter developed, works for the manufacture or use of refrigerating or freezing processes, whether now or hereafter developed, and facilities for the storage, refrigerated or otherwise, of perishable or other articles or commodities, and to sell or otherwise dispose of the products of or the services or facilities rendered by all such plants, lines, works and other property.

### III.

To strike out all of Article Fourth of the Certificate of Incorporation as heretofore amended (except the last paragraph thereof which reads as follows: "The amount of the capital stock with which

this Corporation shall commence business is one hundred thousand, three hundred dollars (\$100,300.00); being one thousand and three (1,003) shares, of the par value of one hundred dollars (\$100.00) each'') and to insert in lieu of that part of said Article so stricken the following:

Fourth: The total number of shares of all classes of stock which the Company shall have authority to issue is 1,515,000 shares, divided into 200,000 shares of Cumulative Prior Preferred Stock of the par value of Fifty Dollars (\$50) each, 115,000 shares of \$3 Cumulative Preferred Stock of the par value of Fifty Dollars (\$50) each and 1,200,000 shares of Common Stock of the par value of Ten Dollars (\$10) each.

#### Subdivision I. Cumulative Prior Preferred Stock

1. Subject to the limitations and provisions in this Article Fourth, the Cumulative Prior Preferred Stock (hereinafter in this Article Fourth sometimes called "prior Preferred Stock") may be issued from time to time in one or more series and in such amounts, not to exceed the total authorized herein, as may be determined by the board of directors. The designations, powers, preferences and relative, optional, conversion and other special rights, and the qualifications, limitations and restrictions thereof, of the Prior Preferred Stock of each series shall be such as are stated and expressed herein and, to the extent not stated and expressed herein, shall be such, not inconsistent with the pro-

visions of this Article Fourth, as may be fixed by the board of directors (authority so to do being hereby expressly granted) and stated and expressed in a resolution or resolutions adopted by said board providing for the issue of Prior Preferred Stock of such series. The words "fixed for such series" shall refer to terms and provisions which are fixed by the board of directors pursuant to such authority and stated and expressed in a resolution or resolutions adopted by said board providing for the issue of Prior Preferred Stock of such series.

2. The holders of Prior Preferred Stock of each series shall be entitled to receive, when and as declared by the board of directors, out of any funds or assets legally available for that purpose, preferential cumulative non-interest-bearing dividends in cash at the rate, not exceeding 7% of the par value per share per annum, fixed for such series and shall not be entitled to receive any dividends over and above such preferential dividends. Such preferential dividends shall be payable quarterly on January 1, April 1, July 1 and October 1 in each year except that with respect to any Prior Preferred Stock issued within 30 days preceding any of such dates, the initial preferential dividend may be paid on the next succeeding dividend payment date. Such preferential dividends shall accrue and be cumulative from the date or dates fixed for each such series. Such preferential dividends shall be declared and paid or set apart for payment in full for all previous quarterly dividend periods before the declaration of, or payment of, or setting apart any



funds or assets for payment of, any dividends on, or the making of or the setting apart of any funds or assets for any distribution with respect to, any class of junior stock, as hereinafter defined, and before any purchase, redemption or other acquisition of any class of junior stock, or the setting apart of any funds or assets for such purchase, redemption or acquisition. For all purposes of this Subdivision I the term "junior stock" shall mean \$3 Cumulative Preferred Stock, Common Stock and any other class of stock hereafter authorized except (i) Prior Preferred Stock and (ii) any future class of stock authorized in compliance with Section 9(b) or 9(c) of this Subdivision I and ranking prior to or on a parity with the Prior Preferred Stock as to dividends or assets. Each share of Prior Preferred Stock shall rank on a parity with each other share of Prior Preferred Stock, irrespective of series, with respect to the preferential dividends at the respective rates fixed for such series, and no preferential dividend shall be declared or paid or set apart for payment on any series unless at the same time a dividend in like proportion to the preferential dividends accrued upon the Prior Preferred Stock of each other series, shall be declared or paid or set apart for payment, as the case may be, on each other series then outstanding.

The Company shall not pay dividends out of capital surplus on Prior Preferred Stock if at the time of, or as a result of, such payment, the amounts of dividends paid on the Prior Preferred Stock out of capital surplus, and not restored by charges to



earned surplus, shall exceed Five Hundred thousand dollars (\$500,000). In the event that any dividends shall be paid on the Prior Preferred Stock out of capital surplus, no dividends shall thereafter be paid on any shares of junior stock until capital surplus shall have been restored by charges to earned surplus in an amount equal to such dividend payments out of capital surplus.

3. At any time after all preferential dividends on the Prior Preferred Stock of all series for all previous quarterly dividend periods shall have been declared and paid or set apart for payment, the board of directors may, after or concurrently with, but not before, the declaration of full preferential dividends on the Prior Preferred Stock of all series for the current quarterly dividend period, declare dividends (payable in cash, property or stock) on outstanding shares of junior stock (subject to the observance of any applicable priorities as between classes of junior stock), out of any funds or assets legally available for that purpose; provided, however, that no dividends on any junior stock shall be paid, set apart for payment, or be payable, before full preferential dividends shall have been paid or set apart for payment on the Prior Preferred Stock of all series for the quarterly dividend period for which such dividend on junior stock shall have been declared. All dividends declared upon any junior stock shall be subject to the provisions of this Section 3 and to the provisions of Section 2 and paragraphs (e) and (f) of Section 9 of this Subdivision I of this Article Fourth.

4. In the event of any voluntary liquidation, dissolution or winding up of the Company or any distribution of the capital of the Company, the holders of Prior Preferred Stock of each series shall be entitled to receive from the assets of the Company, whether represented by capital, surplus, reserves or earnings, such preferential amount, in cash, not exceeding \$55 per share, as may be specifically fixed for such series, and in the event of any involuntary liquidation, dissolution or winding up of the Company, the holders of the Prior Preferred Stock of all series shall be entitled to receive from the assets of the Company, whether represented by capital, surplus, reserves or earnings, a preferential amount in cash equal to \$50 per share, and in each case, whether voluntary or involuntary, a further preferential amount in cash equal to all accrued and unpaid preferential dividends thereon to the date payment is made available to the Prior Preferred Stockholders; all of which shall be paid or set apart for payment before or concurrently with the payment of or setting apart for payment of any amount for, or the distribution of any assets of the Company to, the holders of any junior stock. Each share of Prior Preferred Stock shall rank on a parity with each other share of Prior Preferred Stock, irrespective of series, with respect to the preferential amounts payable upon any distribution of assets by way of liquidation, dissolution or winding up of the Company, and no such amounts shall be paid or set apart for payment on any series unless

at the same time amounts in like proportion to the respective preferential amounts to which the shares of each other series are entitled, shall be paid or set apart for payment on each other series then outstanding. After payment or the setting apart for payment to the holders of Prior Preferred Stock of the preferential amounts so payable to them, all the remaining assets of the Company shall belong to and be distributable to the holders of junior stock in accordance with any applicable priorities as between classes of junior stock.

5. Subject to the provisions of this Section 5, the whole or any part of the Prior Preferred Stock of any series which is made redeemable by the resolution or resolutions providing for the issue of Prior Preferred Stock of such series may, unless preferential dividends on Prior Preferred Stock not then to be redeemed are in arrears on the date on which notice of redemption is given, be redeemed at the option of the Company at any time or from time to time at such redemption price or prices per share, not exceeding \$55 per share, as may be fixed for such series, plus an amount equal to all accrued and unpaid preferential dividends thereon to the date designated for redemption, and upon such other terms and conditions as may be fixed for such series. In the event that at any time less than all the Prior Preferred Stock outstanding is to be redeemed, the shares to be redeemed may be selected pro rata, or by lot, or by such other equitable method as may be determined by the board of directors. Notice of redemption shall be given by the Company by mail-



ing a notice thereof to each holder of record of stock to be redeemed at his last address as the same appears on the books of the Company, such notice to be mailed at least 45 days prior to the date designated for redemption. If such notice of redemption shall have been duly given, and if on or before the redemption date named in such notice all funds necessary for such redemption shall have been set apart by the Company in trust, in a bank or trust company having an aggregate capital and surplus and undivided profits of not less than Two million dollars (\$2,000,000), for the account of the holders of the Prior Preferred Stock to be redeemed, so as to be available therefor, then, from and after the giving of such notice and the setting apart of such funds, notwithstanding that any certificate for shares of Prior Preferred Stock so called for redemption shall not have been surrendered for cancellation, the shares represented thereby shall no longer be deemed outstanding, and the holder of such certificate or certificates shall have with respect to such stock no rights in or with respect to the Company except the right to receive the redemption price thereof and an amount equal to accrued and unpaid preferential dividends thereon to the date designated for redemption, without interest, upon the surrender of such certificate or certificates, and the right, if any, to convert such stock not later than the date designated for redemption to the extent fixed with respect to any series; and after the date designated for redemption such stock



shall not be transferable on the books of the Company except to the Company.

6. Unless preferential dividends on the Prior Preferred Stock are in arrears, the Company shall have the right from time to time to purchase on the open market or at private sale, or otherwise acquire, outstanding Prior Preferred Stock of any series at a price not exceeding the price at which such stock might at the time be redeemed at the option of the Company, plus an amount equal to accrued and unpaid preferential dividends to the date of acquisition or, if such stock is not redeemable, at a price not exceeding the preferential amounts per share payable thereon in the event of voluntary liquidation of the Company as of the date of acquisition.

7. Except as otherwise provided by law or by the provisions of this Article Fourth, each holder of stock of the Company of any class shall be entitled to one vote for all purposes for each share of stock held by him. At all elections of directors each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, or to be elected by the holders of a particular class or classes of stock, as the case may be, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit.

8. (a) If at any time preferential dividends on any Prior Preferred Stock shall be in arrears in

an amount equal to four quarterly dividends thereon, the occurrence of such contingency shall mark the beginning of a period which is hereinafter called a "minority representation period," and if at any time such dividends shall be in arrears in an amount equal to twelve quarterly dividends, the occurrence of such contingency shall mark the beginning of a period which is hereinafter called a "majority representation period." Except that the commencement of a majority representation period shall terminate the then preexisting minority representation period, each minority and majority representation period shall extend and continue until there shall have been declared and paid or set apart for payment on all shares of Prior Preferred Stock at the time outstanding all preferential dividends which shall have accrued and be unpaid for all quarterly dividend periods prior to such payment or setting apart for payment as the case may be.

Said minority representation periods and said majority representation periods are together hereinafter sometimes called "default periods." During each default period, the holders of Prior Preferred Stock, voting as a class, irrespective of series, shall have the right to elect the smallest number of directors necessary to constitute (i) during a minority representation period, one-fifth of the board of directors but not less than two directors, and (ii) during a majority representation period, a majority of the board of directors. Such one-fifth (but not less than two) or such majority, as the case may be, are hereinafter sometimes referred to as the "required proportion." The holders of

outstanding junior stock, voting as a class, shall have the right to elect the remaining members of the board of directors.

(b) During any default period such voting right of the holders of Prior Preferred Stock may be exercised initially at a special meeting called pursuant to paragraph (c) of this Section 8 or at any annual meeting of stockholders, and thereafter at meetings of stockholders, provided that neither such voting right nor the right of the holders of Prior Preferred Stock as hereinafter provided to increase in certain cases the authorized number of directors shall be exercised unless a quorum of the holders of Prior Preferred Stock shall be present in person or represented by proxy, which quorum shall consist of the holders of twenty-five per cent (25%) of the number of shares of Prior Preferred Stock outstanding. The absence of a quorum of the holders of junior stock shall not prevent the exercise by the holders of Prior Preferred Stock of such voting right, nor shall the absence of a quorum of the holders of Prior Preferred Stock prevent the exercise by the holders of junior stock of their voting rights as stated in the last sentence of the preceding paragraph (a). If such voting right of the holders of Prior Preferred Stock is exercised initially at a special meeting called pursuant to paragraph (c) of this Section 8, such holders shall have the right, voting as a class, to elect the required proportion of directors, or, during a majority representation period, such additional number as shall be necessary to bring the number of directors



elected by holders of Prior Preferred Stock up to the then required proportion, such election to be effected either by the filling of vacancies, or if there are no vacancies or an inadequate number thereof, by making such increase in the number of directors as shall be necessary, and the election of directors to the offices so created. Any such increase shall not prevent a subsequent increase or decrease in the number of directors by appropriate amendment of the by-laws made, in any manner provided therein, by the board of directors or the holders of Prior Preferred and junior stocks voting irrespective of classes, provided that during a default period no such amendment shall (1) reduce the number of directors elected by the holders of Prior Preferred Stock to less than the required proportion or (2) terminate the office of a director prior to the first annual meeting of stockholders subsequent to his election at which directors are elected, except with the written consent of such director. At no time shall the by-laws be amended so as to be inconsistent with this Section 8.

(c) Unless the holders of Prior Preferred Stock as a class shall, during an existing minority representation period or majority representation period, as the case may be, have previously exercised their right to elect directors, the board of directors may order, or any stockholder or stockholders owning in the aggregate not less than 5% of the total number of shares of Prior Preferred Stock outstanding, irrespective of series, may request, the calling



of a special meeting of the holders of Prior Preferred Stock for the purpose of the initial exercise of the aforesaid voting right of the holders of Prior Preferred Stock during such period, which meeting shall thereupon be called by the President, a Vice-President or the Secretary of the Company. Notice of such meeting shall be mailed within such time as may be required by the by-laws to each holder of record of Prior Preferred Stock at his last address as the same appears on the books of the Company. Such meeting shall be called for a time not earlier than 20 days and not later than 60 days after such order or request; or in default of an issue of call for such meeting within 30 days after such order or request, such meeting may be called on similar notice by any stockholder or stockholders owning in the aggregate not less than 5% of the total number of shares of Prior Preferred Stock outstanding, irrespective of series. Such meeting shall be held at the place then designated by the Company as the place for the holding of its annual stockholders' meetings.

(d) In any default period the holders of Prior Preferred and junior stocks voting irrespective of classes shall continue to be entitled to elect the whole number of directors until the holders of Prior Preferred Stock shall have exercised their right to vote as a class for the election of directors, after the exercise of which right (1) the directors so elected by the holders of Prior Preferred Stock shall continue in office until their successors shall have been elected by such holders or until the ex-

piration of the default period by the declaration and payment or setting apart for payment of the requisite dividends, whichever shall first occur, and (2) any vacancies in the board of directors shall (except as provided in paragraph (b) of this Section 8) be filled only by vote of a majority of the remaining directors theretofore elected by the holders of the class of stock which elected the director whose office shall have become vacant, or if there be only one such director remaining, then by vote of such director. References in this Section 8 to directors elected by the holders of a particular class of stock shall include directors elected by such directors to fill vacancies as provided in clause (2) of the foregoing sentence.

(e) Immediately upon the expiration of a default period by the declaration and payment or setting apart for payment of the requisite dividends, (1) the right of the holders of Prior Preferred Stock to vote as a class in the election of directors shall cease, (2) the term of all directors elected by the holders of Prior Preferred Stock as a class shall terminate, and (3) the number of directors shall be such number as may be provided for in the by-laws irrespective of any increase made pursuant to the provisions of paragraph (b) of this Section 8 (such number being subject, however, to alteration then or thereafter in any manner provided in the by-laws). Any vacancies in the board of directors effected by the provisions of clauses (2) and (3) in the preceding sentence may be filled by the remaining directors.

9. As long as any Prior Preferred Stock is outstanding the Company shall not without the consent of the holders of two-thirds in number of shares of the outstanding Prior Preferred Stock, irrespective of series except as otherwise in this Section 9 provided, given in person or by proxy at a meeting of stockholders called for that purpose, or given in writing:

(a) amend or repeal any provision of, or add any provision to, the Certificate of Incorporation of the Company, if such action would alter or change the preferences, special rights or powers of the Prior Preferred Stock so as to affect such Prior Preferred Stock adversely; or

(b) increase the authorized amount of the Prior Preferred Stock, or authorize or create any class of stock of the Company having any preference or priority as to dividends or assets superior to or on a parity with any such preference or priority of the Prior Preferred Stock, or authorized or create any stock, security, debt or obligation convertible into any stock of the Company having any such preference, priority or equality; or

(c) reclassify outstanding shares of stock of any class ranking after the Prior Preferred Stock as to dividends or assets into shares of stock of any class ranking on a parity with or having any preference over the Prior Preferred Stock as to dividends or assets; or

(d) by voluntary action dissolve, liquidate, or wind up the Company, or sell or dispose of sub-



stantially all of the assets of the Company, or effect the merger or consolidation of the Company into or with any corporation; provided, however, that nothing in this paragraph (d) shall prevent, or require the consent of the holders of any proportion of the shares of Prior Preferred Stock, as a class, to, (i) the merger or consolidation of the Company into or with a corporation organized under the laws of the State of California, provided that such corporation shall upon the completion of such merger or consolidation, succeed or have succeeded to the ownership of the business and assets owned by the Company immediately prior to such merger or consolidation, and have outstanding a structure of liabilities, capital stock and surplus substantially similar to the structure of the Company immediately prior to such merger or consolidation, and the holders of Prior Preferred Stock of each series shall thereafter have, or shall be offered in exchange, stock having in all material respects the same powers, preferences and rights to which shares of Prior Preferred Stock of such series were entitled immediately prior to such merger or consolidation; or (ii) the merger into the Company of any subsidiary company or companies in which the Company owns or controls, directly or indirectly, more than ninety per cent (90%) of the outstanding stock entitled (at the time immediately preceding such merger) to vote for directors if such merger shall not affect the preferences, special rights or powers of the Prior Preferred Stock so as to affect such Prior Preferred Stock adversely; or



(e) declare or pay any dividends on junior stock out of capital surplus; or distribute capital to, or purchase, redeem or otherwise acquire, any junior stock of the Company, except in exchange for, or by conversion into, or with the proceeds of, junior stock issued after this amendment to this Article Fourth becomes effective; or

(f) declare any dividend on any junior stock of the Company if, or if thereupon, the earned surplus of the Company available for dividends, (as determined in accordance with sound accounting practice and in accordance with any applicable system of accounts prescribed by governmental authorities) would be less than an amount equal to two (2) years' dividend requirements on the Prior Preferred Stock at the time outstanding; provided, however, that nothing in this paragraph (f) shall prevent the declaration or payment of any cumulative preferred dividends on the Company's \$3 Cumulative Preferred Stock accruing during the period from the effective date of this amendment to June 30, 1943, if such declaration or payment complies with the provisions of Sections 2 and 3 of this Subdivision I; or

(g) issue, sell or otherwise dispose of:

(i) any shares of Prior Preferred Stock except an initial issue of 60,000 shares thereof, or

(ii) any shares of any other class of stock ranking prior to or on a parity with the Prior Preferred Stock as to dividends or assets,

unless the net income of the Company determined

in accordance with generally accepted accounting practice to be available for the payment of dividends for a period of twelve consecutive calendar months within the fifteen calendar months immediately preceding the issuance, sale or disposition of such stock, is at least equal to three and one-half times the annual dividend requirements on all outstanding shares of Prior Preferred Stock and of all other classes of stock ranking prior to or on a parity with the Prior Preferred Stock as to dividends or assets, including the shares proposed to be issued, and unless the income of the Company for said period, determined in accordance with such generally accepted accounting practice (but in any event after deducting all taxes and the amount for said period charged by the Company on its books to depreciation expense) to be available for the payment of interest, shall have been at least one and three-fourths times the sum of (i) the annual interest charges on all interest bearing indebtedness of the Company which will be outstanding immediately after the issuance of such stock proposed to be issued and (ii) the annual preferred dividend requirements on all outstanding shares of Prior Preferred Stock and of all other classes of stock ranking prior to or on a parity with the Prior Preferred Stock as to dividends or assets, including the shares proposed to be issued, provided, however, that in the event the Company shall have acquired any electric plant or system within or after the particular period for which the calculation of the earnings of the Company is made, or shall ac-

quire such plant or system simultaneously with the issuance of such stock, then, in computing such earnings there shall be included, to the extent that they may not have been otherwise included, the net earnings or net losses of, and charges applicable to, such acquired plant or system for the whole of such period, such net earnings or net losses and charges to be ascertained and computed as if such acquired plant or system had been owned by the Company during the whole of such period.

Provided, however, that:

(i) If any action described in the foregoing paragraph (a) would affect adversely Prior Preferred Stock of less than all series, such action shall require the consent of the holders of two-thirds ( $2/3$ ds) in number of shares of the outstanding Prior Preferred Stock of such series only as may be so affected, acting as a class, given as aforesaid;

(ii) Any action specified in this Section 9 as requiring such consent of the holders of Prior Preferred Stock, irrespective of series, or of the holders of Prior Preferred Stock of less than all series, as the case may be, may, unless provided otherwise by statute, be taken with such consent, and with such additional vote or consent, if any, of holders of junior stock, or of a particular class or classes of junior stock, as from time to time may be required by law.

## Subdivision II. §3 Cumulative Preferred Stock

1. For the purposes of this Subdivision II of



this Article Fourth the following terms shall have the following meanings unless the context shall otherwise require:

(a) the term “this amendment” means this amendment to this Article Fourth of the Certificate of Incorporation of the Company. References to this amendment becoming “effective” (or to the “effective date” thereof) shall refer to the filing (or date of filing) for recording in the office of the Recorder of New Castle County, Delaware, of a copy of the applicable Certificate of Amendment, certified by the Secretary of State of the State of Delaware.

(b) the term “\$3 Preferred Stock” means the \$3 Cumulative Preferred Stock of the par value of \$50 per share authorized by this amendment.

(c) the term “old Preferred Stock” means the Preferred Stock of the Company of the par value of \$100 per share outstanding immediately prior to this amendment becoming effective.

2. Upon this amendment becoming effective each share of old Preferred Stock shall by virtue of this amendment be automatically reclassified and converted into (a) four-fifths ( $4/5$ ths) of one share of \$3 Preferred Stock, and (b) six shares of Common Stock. The remaining shares of \$3 Preferred Stock authorized by this amendment may be issued by the Company from time to time for such consideration, not less than the par value thereof, as may be fixed from time to time by the board of directors.



3. Subject to the applicable provisions of Subdivision I of this Article Fourth and to the applicable provisions of any resolution of the board of directors lawfully adopted pursuant to the provisions of Section 1 of said Subdivision I, the designations, powers, preferences and relative and other special rights, and the qualifications, limitations and restrictions thereof, of the \$3 Preferred Stock shall be as set forth in this Subdivision II.

4. Subject to compliance with the provisions of Sections 2 and 3 and paragraphs (e) and (f) of Section 9 of Subdivision I, the holders of shares of \$3 Preferred Stock shall be entitled to receive, when and as declared by the board of directors, out of any funds or assets legally available for that purpose, preferential cumulative dividends in cash as follows:

(a) in the case of each share of \$3 Preferred Stock issued upon the reclassification and conversion of one and one-fourth ( $1\frac{1}{4}$ ) share of old Preferred Stock as required in Section 2 of this Subdivision II, an amount equal to the aggregate of:

(i) the unpaid portion of the cumulative preferred dividends which shall have accrued on each one and one-fourth ( $1\frac{1}{4}$ ) share of such old Preferred Stock from the date of accrual to the effective date of this amendment; and

(ii) cumulative preferential dividends at the rate of Three Dollars (\$3) per share per annum on the \$3 Preferred Stock from and after the effective date of this amendment; and

(b) in the case of all other shares of \$3 Preferred Stock, cumulative preferential dividends at the rate of Three Dollars (\$3) per share per annum, which dividends shall accrue from the first day of the quarter in which such shares are issued.

Each share of \$3 Preferred Stock shall rank on a parity with each other share of \$3 Preferred Stock with respect to current preferential dividends. The preferential cumulative dividends which accrue on the \$3 Preferred Stock after the effective date of this amendment shall be payable quarterly for the quarters ending on the last days of March, June, September and December in each year. The holders of shares of \$3 Preferred Stock shall not be entitled to receive any dividends over and above such preferential cumulative dividends as hereinbefore provided for, and such dividends shall not bear interest. Such preferential cumulative dividends shall be declared and paid or set apart for payment in full for all previous quarterly dividend periods before the declaration of payment of or setting apart for payment of any dividends on, or the making of or setting apart of any funds or assets for any distribution with respect to any Common Stock, and before or concurrently with any purchase or other acquisition of any Common Stock, or the setting apart of any funds or assets for such purchase or acquisition. At any time after cumulative preferred dividends on the \$3 Preferred Stock for all previous quarterly dividend periods (including, without limitation, preferred dividends

accruing prior to the effective date of this amendment) shall have been declared and paid or set apart for payment, the board of directors may, after or concurrently with, but not before, the declaration of full preferential dividends on the \$3 Preferred Stock for the current quarterly dividend period, and also subject to compliance with the provisions of Sections 2 and 3 and paragraphs (e) and (f) of Section 9 of Subdivision I, declare dividends (payable in cash, property or stock) on outstanding shares of Common Stock out of any assets legally available for that purpose; provided, however, that no dividends on any Common Stock shall be paid, set apart for payment, or be payable, before full preferential dividends shall have been paid or set apart for payment on the \$3 Preferred Stock for the quarterly dividend period for which such dividend on Common Stock shall have been declared.

5. In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Company or any distribution of the capital of the Company, the holders of \$3 Preferred Stock shall be entitled to receive from the assets of the Company available for distribution to the holders of stock junior to the Prior Preferred Stock, and whether represented by capital, surplus, reserves or earnings, a preferential amount in cash equal to the par value of such shares of \$3 Preferred Stock together with a further preferential amount in cash equal to all accrued and unpaid cumulative preferential dividends thereon to the date payment is made



available to the \$3 Preferred Stockholders; all of which shall be paid or set apart for payment before or concurrently with the payment of or setting apart for payment of any amount for, or the distribution of any assets of the Company to, the holders of any Common Stock. Each share of \$3 Preferred Stock shall, on the basis of the par value thereof plus all unpaid accrued dividends thereon, rank on a parity with each other share of \$3 Preferred Stock (on the basis of the par value thereof plus all unpaid accrued dividends thereon) with respect to the preferential amounts payable on any distribution of assets by way of liquidation, dissolution or winding up of the Company and no such amount shall be paid or set apart for payment on any shares of \$3 Preferred Stock unless at the same time amounts in like proportion to the respective preferential amounts to which each other share is entitled, shall be paid or set apart for payment on each other share then outstanding. After payment or the setting apart for payment to the holders of the Prior Preferred Stock and the holders of \$3 Preferred Stock of the preferential amounts so payable to them, all the remaining assets of the Company shall belong to and be distributable pro rata to the holders of Common Stock.

6. The voting rights of holders of \$3 Preferred Stock and of Common Stock shall be as set forth in Sections 7 and 8 of Subdivision I of this Article Fourth.



## Subdivision III. Common Stock

Each share of Common Stock of the par value of \$10 per share outstanding at the time this amendment becomes effective shall continue to be a share of Common Stock of the par value of \$10 per share. Additional shares of authorized Common Stock, in the requisite number, shall be issued to effect the reclassification and conversion of old Preferred Stock pursuant to Section 2 of Subdivision II. The remaining number of shares of Common Stock authorized by this amendment may be issued by the Company from time to time for such consideration, not less than the par value thereof, as may be fixed from time to time by the Board of Directors.

## Subdivision IV. Denial of Preemptive Right

No holder of any shares of any class of stock of the Company shall be entitled as of right to subscribe for, purchase or receive any shares of Prior Preferred Stock or of \$3 Preferred Stock issued by the Company (including shares of Prior Preferred Stock which are convertible into or exchangeable for one or more classes of junior stock). Except to the extent that the holders of Prior Preferred Stock of any series may be granted the optional privilege of converting such stock into, or exchanging such stock for, one or more classes of junior stock, such conversion or exchange privilege being stated and expressed in the resolution or resolutions providing for the issue of such Prior Preferred Stock of such series adopted by the board

of directors, no holder of any Prior Preferred Stock issued by the Company, as such holder, shall be entitled as of right to subscribe for, purchase or receive any shares of stock of any class issued by the Company. No holder of any \$3 Preferred Stock of the Company, as such holder, shall be entitled as of right to subscribe for, purchase or receive any shares of stock of any class issued by the Company. No holder of any class of stock of the Company, as such holder, shall be entitled as of right to subscribe for, purchase or receive any shares of Common Stock issued upon the reclassification and conversion of old Preferred Stock pursuant to the provisions of Section 2 of Subdivision II or issuable upon the exercise by the holder of shares of Prior Preferred Stock of any series of any optional conversion or exchange privilege stated and expressed in the resolution or resolutions adopted by the board of directors providing for the issue of Prior Preferred Stock of such series.

#### IV.

To strike out the eleventh paragraph of Article Eighth of the Certificate of Incorporation as heretofore amended, which paragraph now reads as follows:

This Corporation reserves the right to amend, alter, change, or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by the statutes of the State of Delaware, and also the right to reorganize and

reincorporate under the laws of any other state, and all rights conferred on officers, Directors, and stockholders, are granted subject to these reservations. and to insert in lieu thereof the following:

Subject to compliance with the applicable provisions of Section 9 of Subdivision I of Article Fourth, this Corporation reserves the right to amend, alter, change, or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by the statutes of the State of Delaware, and also the right to reorganize and reincorporate under the laws of any other state, and all rights conferred on officers, Directors, and stockholders, are granted subject to these reservations.

I, L. G. Peck, Assistant Secretary of California Electric Power Company, do hereby certify that the above is a full, true and correct copy of amendment to the Certificate of Incorporation of The Nevada-California Electric Corporation (Name changed June 30, 1941, to California Electric Power Company) adopted at a meeting of stockholders of said corporation held June 20, 1941.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Company this 4th day of August, 1949.

[Seal]      /s/ L. G. PECK,

Assistant Secretary.

## Exhibit B

Certified Copy of Resolution Adopted by Board  
of Directors of The Nevada-California Elec-  
tric Corporation

(Name Changed June 30, 1941 to California Elec-  
tric Power Company) at a Meeting Held  
May 29, 1941.

Resolved, that, at such time as the President may deem advisable, the Corporation shall make an offer to the holders of the existing preferred stock, for acceptance within 20 days of the making of such offer or within such extended period as the Board may direct, to issue one-fifth of a share of \$3 preferred stock and to pay one dollar in cash to the holder of each share of existing preferred stock who shall accept such stock and such payment in full settlement of the right of such holder to all cumulative preferred dividend arrearages which shall have accrued on such existing preferred stock to and including June 30, 1941, provided that the consummation of such settlement of said arrears and the issuance of said \$3 preferred stock and the payment of said cash shall be contingent upon the amendments to the Certificate of Incorporation of the Corporation which have this day been declared advisable by the Board of Directors becoming effective under the laws of the State of Delaware, and further

Resolved, that in the event that such amendments become effective the proper officers of the Corpora-



tion shall be authorized to execute and deliver stock certificates representing the shares of \$3 preferred stock issuable upon such settlement, either separate from or in conjunction with the issuance of shares of \$3 preferred stock issued pursuant to the reclassification provisions of such amendments.

\* \* \*

I, L. G. Peck, Assistant Secretary of California Electric Power Company, do hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of The Nevada-California Electric Corporation at a meeting of said Board duly held on the 29th day of May, 1941, a quorum of said Board being present.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Company this 4th day of August, 1949.

[Seal]      /s/ L. G. PECK,

Assistant Secretary.

[Endorsed]: Filed December 5, 1949.

In the District Court of the United States South-  
ern District of California, Central Division

No. 7888-BH

CALIFORNIA ELECTRIC POWER COM-  
PANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### OPINION

Appearances:

DEMPSEY, THAYER, DEIBERT &  
KUMLER, Esqs.

1104 Pacific Mutual Building  
Los Angeles 14, California,  
Attorneys for Plaintiff,

ERNEST A. TOLIN, Esq.,  
United States Attorney,

E. H. MITCHELL, and  
EDWARD R. McHALE, Esqs.,  
Assistant United States Attorneys,

EUGENE HARPOLE and  
JAMES D. PETTUS, Esqs.,  
Special Attorneys, Bureau of Internal  
Revenue,  
Attorneys for Defendant.

U. S. Post Office and Court House  
Los Angeles 12, California,

This is an action to recover the sum of \$4,549.51,

alleged to have been erroneously exacted from the plaintiff, under Section 1802(a) of the Internal Revenue Code, Title 26, U.S.C.A., prior to the amendment of 1947, as a documentary stamp tax upon a certain issue of stock by plaintiff. The question for decision is whether the entire issue or only a part thereof of plaintiff's new preferred stock constituted an original issue within the meaning of Section 1802(a). The facts were stipulated and are substantially as follows:

Prior to the time of the recapitalization in June of 1941, plaintiff's capital stock consisted of 105,023 preferred shares, each having a par value of \$100.00, and 84,683 common shares, each having a value of \$10.00. The stamp tax due on this stock had been paid. On June 20, 1941, the certificate of incorporation was amended to provide that each of the outstanding shares of old preferred stock were to be automatically converted into  $\frac{4}{5}$  share of \$3.00 cumulative preferred stock of a par value of \$50.00 each, and six shares of common stock of a par value of \$10.00 each. This amendment was to be effective June 30, 1941. This change did not affect the proportionate interests of the shareholders in the corporation's assets. By itself this transaction would have been free of any stamp tax.

However, on June 30, 1941, the effective date of the amendment, the unpaid cumulative dividends on the old preferred stock were \$11.00 per share. To settle the arrearages of dividends the Board of Directors had previously, by resolution, on May

29, 1941, authorized the making of an offer to the preferred shareholders of 1/5 share of \$3.00 cumulative preferred stock and \$1.00 in cash in full settlement of all arrearages on each share. The offer was to remain open until June 25, 1941, and was contingent on the amendment of the certificate of incorporation by the shareholders.

Pursuant to the plan for settlement of the dividend arrearages plaintiff issued new \$3.00 stock on a one new for five old basis to the shareholders accepting the offer. Upon completion of the exchange, new capital sufficient to pay the dividend arrearages was transferred from surplus to the preferred stock account, so that the interest of the preferred stockholders accepting the offer was transmuted from a claim for dividends into additional shares of stock representing capitalized surplus.

Stated simply for the purposes of illustration, the two transactions may be compared as follows: If shareholder A had 50 shares of the original preferred stock, following the amendment he now has 40 shares of the new preferred stock. If he accepts the offer of stock for dividend arrearages he receives ten additional shares of the new preferred stock and \$50.00 in cash. At the same time there is a transfer from surplus to the capital stock account of an amount equal to the share value of the 10 additional shares.

If shareholder B had 50 shares of the original preferred stock, following the amendment he also



now has 40 shares of the new preferred shares. If he does not accept the offer of the stock for the dividend arrearages he, of course, receives no additional shares and there is no transfer of any surplus to the preferred stock account. As to shareholder B, there has been no change except an exchange of old preferred shares for new preferred shares. His proportionate claim against the corporation's assets remains unchanged.

The plaintiff admits that the shares issued in satisfaction of the unpaid dividends were within the meaning of the term "original issue" and concedes the tax upon them.

The Commissioner conceded that no tax was due upon the new issue of the common stock but determined that the transfer of the surplus to the preferred stock account resulted in the dedication of additional capital; that this represented capital upon which no previous issue tax had ever been paid; and that the old capital and the new capital were so intermingled that it is impossible to determine which specific shares are represented by new capital added to the preferred stock account.

The tax was paid under protest and the claim for refund was denied.

The applicable statute at the time of the issue, Section 1802(a), imposed a stamp tax on the original issues of capital stock. The tax applies to each original issue (whether on organization or reorganization) of certificates (or shares issued without certificate) of stock, or of profits, or of

interests in property or accumulations by any corporation.

The government contends that the entries upon the corporate books fail to disclose any shares specifically designated as a substitution for old certificates. It suggests that inasmuch as no shares were issued in lieu of any certain specified shares and no specific certificates charged against any particular segment of the capital or surplus, it is impossible to classify the entire issue as other than original. This is the same argument advanced in *U. S. v. Pure Oil Co.*, 135 F. (2d) 578, a decision of the 7th Circuit on substantially the same facts as we have in the instant case.

The court in *U. S. v. Pure Oil Co.*, *supra*, refused to adopt this contention. Speaking of the issue of stock by the Pure Oil Company the court stated:

“\* \* \* It accomplished nothing other than replacement of older preferred stock with new, smaller dividend stock; the holders retained the same proportionate interests in the capital assets. The additional shares issued in satisfaction of unpaid dividends represented the only contribution to capital effectuated; that and that alone was an original issue, (citing numerous cases) (underscoring supplied).

“\* \* \* The undisputed fact is that the old preferred stock was exchanged share for share and the dividend arrears satisfied by issuance of additional shares. Whatever the book en-

tries, the only new thing that could properly have gone into the capital account was the contribution by the shareholders of their unpaid dividends to the corporation in consideration of which they received the additional shares.”

The government criticises this decision, at the same time it did not endeavor to justify its attempted exaction of over \$20,000.00 by applying for a writ of certiorari. It is interesting to note that Circuit Judge Minton, now a member of the Supreme Court of the United States concurred in said opinion.

The government cites *American Gas & Electric Co. v. U. S.* 69 F. Supp. 614 (D.C., N.Y.) in support of its contention that the two issues were so intermingled that they must be treated as one. This decision is not critical of the *Pure Oil* case as contended by the government. Judge Caffey clearly distinguished the two cases on the facts and I think attempted to justify his conclusions by stating on page 620 as follows:

“\* \* \* Apparent hardship to the taxpayer does not justify a departure from the literal language of the statute.”

The government urges two decisions of the Ninth Circuit as authority for its position in this case, *Rio Grande Oil Co. v. Welch*, 101 F. 2d 454, and *Southern Pacific Co. v. Berliner* 176 F. 2d 671. Both of these cases are clearly distinguished from

the present case on the facts. In the Southern Pacific case Judge Healy did not mention the Pure Oil case, which indicates he recognized that factually they were not comparable. The failure to refer to it was intentional as it was cited on another point in the opinion written by Judge Roche in the District Court in *Southern Pacific Co. v. Berliner*, 78 F. Supp. 696-697.

The authorities cited by the government in support of its interpretation of the statute created serious inequities. Congress, recognizing the inequities created by the interpretation placed upon the statute by the Commissioner, supported by the courts, put a stop to the same by the amendment of 1947. While the amendment is not retroactive, it clearly indicates that the interpretation of the former act did not meet the approval of Congress. Under such circumstances, I see no reason why I should meekly submit to the Commissioner's rulings thereby helping to perpetuate an inequity that Congress has already recognized and precluded its repetition in the future.

From the stipulation of facts I find that the two transactions were sufficiently separate and apart to permit the necessary allocation. The method of keeping the records is not controlling (*So. Pac. Co. v. Berliner*, 176 F. 2d 671). In a transaction such as we have in this case, there is no apparent difficulty in allocating the increase in capital to the shares issued in lieu of dividends. The Pure Oil case is very persuasive and also very refreshing and I am accepting it as my guide in this case.



Plaintiff is entitled to judgment as prayed for. Counsel for the plaintiff is directed to submit proposed finding and judgment within fifteen days from date hereof.

Dated: This 16th day of March, 1950.

/s/ BEN HARRISON,  
Judge.

[Endorsed]: Filed March 16, 1950.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause was submitted to the Court for decision on December 5, 1949, by Plaintiff's attorney, Arthur H. Deibert, and Defendant's attorney, Eugene Harpole, on a stipulation of facts, briefs were filed by each of the parties and the Court having fully considered the same hereby makes the following special Findings of Fact:

### Findings of Fact

#### I.

That California Electric Power Company (formerly named The Nevada-California Electric Corporation) is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, duly licensed to engage in business in the State of California; that California

Electric Power Company's principal office is located at 3771 Eighth Street, City of Riverside, County of Riverside, State of California, and in the Southern Judicial District of California, Central Division.

## II.

That the documentary stamp taxes here involved, in the amount of \$4,549.51, were paid on or about January 28, 1942, by the California Electric Power Company to Ralph Nicholas, the duly appointed, qualified and acting Collector of Internal Revenue for the collection district comprising the State of Colorado.

## III.

That prior to recapitalization on June 30, 1941 the Plaintiff's capital stock consisted of 105,023 preferred shares having a par value of \$100.00 per share, and 84,683 common shares having a par value of \$10.00 per share. The stamp tax on this stock had been paid.

## IV.

That on June 20, 1941, Plaintiff's certificate of incorporation was amended to provide that each of the outstanding shares of old preferred stock were to be automatically converted into  $\frac{4}{5}$  share of \$3.00 cumulative preferred stock of a par value of \$50.00 each, and six shares of common stock of a par value of \$10.00 each. This amendment was to be and became effective June 30, 1941. This change did not affect the proportionate interests of the shareholders in the corporation's assets.

## V.

That the Commissioner of Internal Revenue has conceded that no stamp tax is due by virtue of the issuance of the aforesaid new common stock.

## VI.

That on June 30, 1941, unpaid Cumulative Preferred dividends on the old Preferred Stock of California Electric Power Company amounted to \$11.00 per share.

## VII.

That in order to settle the arrearages of dividends the Board of Directors had previously, by resolution, on May 29, 1941, authorized the making of an offer to the preferred shareholders of  $1/5$  share of \$3.00 cumulative preferred stock and \$1.00 cash in full settlement of all arrearages on each share. The offer was to remain open until June 25, 1941, and was contingent on the amendment of the certificate of incorporation by the shareholders.

## VIII.

That pursuant to the plan for settlement of the dividend arrearages Plaintiff issued new \$3.00 stock on a one new for five old basis to the shareholders accepting the offer. Upon completion of the exchange, new capital sufficient to pay the dividend arrearages was transferred from surplus to the preferred stock account, so that the interest of the preferred stockholders accepting the offer was transmuted from a claim for dividends into

additional shares of stock representing capitalized surplus.

### IX.

That the number of shares of new Preferred Stock at \$50.00 per share issued up to January 24, 1942 was 103,398.

### X.

That the Plaintiff concedes liability and has paid the stamp tax due upon the shares issued in settlement of dividend arrearages.

### XI.

That the Commissioner determined that the transfer of the surplus to the preferred stock account resulted in the dedication of additional capital; that this represented capital upon which no previous issue tax had ever been paid; and that the old capital and the new capital were so intermingled that it is impossible to determine which specific shares are represented by new capital added to the preferred stock account.

### XII.

That Plaintiff, pursuant to the aforesaid ruling of the Commissioner, paid the sum of \$4,549.51 here in question under protest. This sum represents the difference between the amount conceded to be due by Plaintiff on stock issued in settlement of dividend arrearages and that asserted by the Commissioner upon the entire issue of new preferred stock up to January 24, 1942.



XIII.

That on or about January 24, 1946, California Electric Power Company filed with the Collector of Internal Revenue at Denver, Colorado, a Claim for Refund of stamp taxes paid in the amount of \$4,549.51, together with interest thereon as provided by law.

XIV.

That the Commissioner of Internal Revenue, by letter dated June 16, 1947, rejected said Claim for Refund filed on or about January 24, 1946, as aforesaid.

From these facts, the Court concludes:

Conclusions of Law

I.

That the failure of the Plaintiff to issue specific shares in lieu of certain specified shares or the failure to charge specific shares against any particular segment of capital or surplus does not necessarily make the entire issue of stock an original issue. Book entires alone are not decisive.

II.

The issuance of new preferred stock in partial satisfaction of dividend arrearages was a sufficiently separate and distinct transaction from the exchange of new preferred stock for old as to allow an allocation to be made between the new capital thereby added and the old capital for which the exchange was made.

## III.

The only new capital which was dedicated by these transactions was that attributable to the issuance of new preferred stock in partial settlement of dividend arrearages and the shares so issued constituted the only original issue of stock within the meaning of Section 1802(a) Internal Revenue Code as it existed prior to January 24, 1942.

## IV.

The issuance of new preferred stock in exchange for old preferred stock did not constitute an "original issue" of stock within the meaning of Section 1802(a) of the Internal Revenue Code as it existed prior to January 24, 1942, and that no tax was therefore due upon the issuance thereof.

## V.

Plaintiff is entitled to judgment as prayed.

Dated: April 17, 1950.

/s/ BEN HARRISON,  
Judge.

Approved as to Form:

/s/ EUGENE HARPOLE,  
Special Attorney,  
Bureau of Internal  
Revenue.

[Endorsed]: Filed April 17, 1950.

In the District Court of the United States, Southern District of California, Central Division

N. 7888-BH

CALIFORNIA ELECTRIC POWER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT

The above-entitled cause came before the Court sitting without a jury on December 5, 1949. Plaintiff was present in Court and represented by its Counsel, Arthur H. Deibert, and Defendant was present in Court and represented by its Counsel, Eugene Harpole. The cause was thereupon submitted to the Court upon a stipulation of facts signed by attorneys for the parties hereto. Briefs were filed on behalf of the parties hereto. Thereafter, the Court, having fully considered the facts and the briefs and being fully advised in the premises, ordered preparation of its findings of fact and conclusions of law and judgment.

Wherefore, by reason of the law and the evidence and the findings of fact and conclusions of law of the Court which have been filed and the premises aforesaid,

It Is Ordered, Adjudged and Decreed, and this does order, adjudge and decree that the Plaintiff

have judgment against and have and recover of and from the Defendant named above the sum of \$4,549.51, plus interest thereon from January 28, 1492, until paid.

Done and dated at Los Angeles, California, this 17th day of April, 1950.

/s/ BEN HARRISON,

United States District Judge.

Approved as to Form:

/s/ EUGENE HARPOLE,

Special Attorney,

Bureau of Internal  
Revenue.

Judgment entered April 17, 1950.

[Endorsed]: Filed April 17, 1950.



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, the above-named defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 17, 1950.

Dated: June 12, 1950.

/s/ ERNEST A. TOLIN,  
United States Attorney.

By /s/ E. H. MITCHELL,  
Assistant United States  
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1950.

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[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
DEFENDANT (AS APPELLANT) IN-  
TENDS TO RELY ON APPEAL

The defendant, upon its appeal from the judgment entered in the above cause on April 17, 1950, intends to rely upon the following points:

1. The Court erred by concluding that, in the conversion of plaintiff's outstanding preferred

stock to new preferred stock, the issuance of the new preferred in partial satisfaction of dividend arrearage was sufficiently separate and distinct from the exchange of new preferred stock from the old preferred stock as to allow an allocation to be made between the new and the old capital.

2. The Court erred by failing to conclude that the new capital, consisting of dividend arrearages, was added to and commingled with the old capital of the preferred capital stock account so that the added capital could not be identified with specific shares of the new preferred stock and, therefore, an original issue tax was incurred as to 103,398 shares of the new preferred stock.

3. The Court erred by having judgment entered for the plaintiff.

Dated June 12, 1950.

/s/ ERNEST A. TOLIN,  
United States Attorney.

By /s/ E. H. MITCHELL,  
Assistant United States  
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1950.

[Title of District Court and Cause.]

## DESIGNATION OF RECORD ON APPEAL

Comes now the above-named defendant and hereby designates the portions of the record and proceedings to be contained in the record on appeal herein:

The defendant designates the entire record herein, including the Complaint, the Answer, the Stipulation of Facts, including the exhibits attached thereto and made a part thereof, the Decision of the Court, the Court's Findings of Fact and Conclusions of Law and the Judgment as entered.

Dated this 12th day of June, 1950.

/s/ ERNEST A. TOLIN,  
United States Attorney.

By /s/ E. H. Mitchell,  
Assistant United States  
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1950.

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[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States

District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 69, inclusive, contain the original Complaint; Answer; Stipulation of Facts; Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points Upon Which Appellant Intends to Rely on Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 12th day of July, A.D. 1950.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THURMON HOCKE,  
Chief Deputy.

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[Endorsed]: No. 12611. United States Court of Appeals, for the Ninth Circuit. United States of America, Appellant, vs. California Electric Power Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 14, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In The United States Court of Appeals  
for the Ninth Circuit

Undocketed

UNITED STATES OF AMERICA,

Appellant,

vs.

CALIFORNIA ELECTRIC POWER COM-  
PANY, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS  
TO BE RELIED UPON ON APPEAL

Pursuant to the provisions of Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, Appellant hereby designates the following points upon which it intends to rely in its appeal in the above-entitled case:

1. The Court erred by concluding that, in the conversion of Plaintiff-Appellee's outstanding preferred stock to new preferred stock, the issuance of the new preferred in partial satisfaction of dividend arrearage was sufficiently separate and distinct from the exchange of new preferred stock from the old preferred stock as to allow an allocation to be made between the new and the old capital.

2. The Court erred by failing to conclude that

the new capital, consisting of dividend arrearages, was added to and commingled with the old capital of the preferred capital stock account so that the added capital could not be identified with specific shares of the new preferred stock and, therefore, an original issue tax was incurred as to 103,398 shares of the new preferred stock.

3. The Court erred by having judgment entered for the Plaintiff-Appellee.

Dated: This 10th day of July, 1950.

ERNEST A. TOLIN,  
United States Attorney.

E. H. MITCHELL, and  
EDWARD R. McHALE,  
Assistant United States  
Attorneys.

EUGENE HARPOLE, and  
FRANK W. MAHONEY,  
Special Attorneys,  
Bureau of Internal  
Revenue.

By /s/ EUGENE HARPOLE,  
Attorneys for Appellant,  
United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed July 14, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS  
OF RECORD BELIEVED NECESSARY  
FOR CONSIDERATION ON APPEAL AND  
TO BE PRINTED

Pursuant to Rule 19(6) of this Court, Appellant hereby designates the following parts of the record as being necessary for consideration of the points upon which it intends to rely in this appeal, and which it desires to have printed, omitting the title of Court and cause from each of the documents designated for printing:

Pages of Certified Record

1. Page 1—Names and addresses of attorneys.
2. Pages 2 to 19, inclusive—Complaint.
3. Pages 21, 22—Answer.
4. Pages 23 to 39, inclusive—Stipulation of Facts, but omitting pages 40 to 50, inclusive, which duplicate pages 8 to 19, inclusive, of the record.
5. Pages 52 to 57, inclusive—Opinion.
6. Pages 58 to 62, inclusive—Findings of Fact and Conclusions of Law.
7. Pages 63 and 64—Judgment.
8. Page 65—Notice of Appeal.
9. Pages 66 and 67—Statement of Points to be Relied Upon on Appeal (District Court).

10. Page 68—Designation of Contents of Record on Appeal (District Court).

11. This Designation.

12. Appellant's Statement of Points to be Relied Upon (Circuit Court).

Certificate of Clerk.

Dated: This 10th day of July, 1950.

ERNEST A. TOLIN,  
United States Attorney.

E. H. MITCHELL, and  
EDWARD R. McHALE,  
Assistant United States  
Attorneys.

EUGENE HARPOLE, and  
FRANK W. MAHONEY,  
Special Attorneys,  
Bureau of Internal  
Revenue.

By /s/ EUGENE HARPOLE,  
Attorneys for Appellant,  
United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed July 14, 1950.